

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2010-032055

07/20/2012

HONORABLE MICHAEL J. HERROD

CLERK OF THE COURT  
M. Sahli  
Deputy

FIRST UNITED FUNDING L L C

NICOLE FRANCE STANTON

v.

WESDON FINANCIAL L L C, et al.

CLIFFORD B ALTFELD

MINUTE ENTRY

This matter arises in a Preliminary Injunction proceeding in which Defendants' seek to enjoin the Trustee's Sale of the property subject to the deeds of trust pending trial on the underlying claims and counterclaims. The Court has heard two days of evidentiary hearing on April 13, 2012 and July 17, 2012 and received substantial briefing.

**Factual Background**

Based on the evidence presented, the Court finds the following facts:

Defendants were the developers of a property in Pinal County known as Peralta Canyon. The property consists of approximately 320 acres of land that Defendants acquired in three parcels. The first two parcels were purchased in 2005 and 2006, respectively, with financing through Hilton Financial Corporation. The loans were typical of those by developers wherein they were for a one year term with interest only payments, with an interest reserve account funded from the loan, secured by the property.

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Initially, Defendants did not intend to develop the property themselves, but to acquire the property, obtain initial zoning for the intended residential use, then sell the property to a home builder, or other developer.

In 2006, Defendants were approached by Corey Johnston, who was the principal of First United Funding. Defendant Michael Moore knew Mr. Johnston through Mr. Moore's acquaintance with Jerry Moyes. Mr. Moore was aware that Mr. Johnston provided funding for Mr. Moyes' entities.

Ultimately, Defendants decided to refinance the first two parcels with First United Funding. The transaction was also for a one year term with interest only payments funded from an interest reserve account funded from the loan. First United Funding made the first loan secured by the first two parcels in January 2007 in the amount of \$13,875,000.00. Hilton Financial was paid off and an interest reserve was allegedly set up, although that issue is contested.

First United Funding funded the purchase of the third parcel in July 2007 in the amount of approximately \$8,300,000.00. Once again, the loan was for a one year term with interest only payments to be paid from an interest reserve. The loan also included funds for a construction draw account so that Defendants would have funds to finance improvements to the property. At this point the plan for the properties had changed such that Defendants intended to fully develop the property, at least through final plat approval. That plan required construction of infrastructure to meet zoning and plat requirements.

Loan extensions were granted to make the end of the terms of both loans the same, and additional extensions extended the maturity of the loans to late 2008. The loans have been in default since that maturity date.

At each stage of development, a developer can enhance the value of the property and choose to sell to another developer, thereby profiting from the increased value of the property, or may choose to finance and complete the next stage of development, thereby increasing the value of the property again. Property values throughout the process are subject to market fluctuation and supply and demand.

First United Funding did not finance all of the loans by itself, but sold participation in various loans to banks and private investors. In this instance, the evidence shows that, as to the first loan, First United Funding sold \$13,875,000.00 participation to Columbian Bank and \$1,000,000 participation to another bank, thereby over-subscribing the loan. The evidence

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further shows that, as to the second loan, First United Funding sold a portion of the participation to Columbian Bank, and retained the majority of the participation to itself.

Ultimately, Mr. Johnston, who was the sole principal of First United Funding, was convicted in Federal Court of criminal fraud as to the participant banks and investors for running the type of scheme described above on a large scale basis.

Columbian Bank was taken over by the FDIC which sought the appointment of a receiver for First United Funding in Minnesota. The receiver is bringing this action for breach of contract, breach of guaranties, unjust enrichment and constructive trust.

Defendants' Third Amended Counterclaim alleges 13 counts including contract and tort claims, as well as the claim for injunctive relief. The Counterclaim also includes Count Thirteen seeking for the Court to quiet title to the property and declare the deeds of trust unenforceable.

Defendants allege that Mr. Johnston, on behalf of First United Funding, fraudulently induced defendants into borrowing from First United Funding by, among other things, asserting that "he was the bank", that he would carry them through to the end, that he would roll the loans over annually until development was completed, and that he could act quickly and be responsive.

Defendants also allege that First United, through Mr. Johnston, committed fraud by, among other things, not disclosing that it was insolvent, not disclosing the Ponzi scheme, not disclosing that it was overselling participation interests, and by not disclosing that it was operating a criminal enterprise.

First United Funding alleges that the funds were loaned, that they have not been repaid, and the foreclosure of the deed of trust should proceed, and then the other causes of action should proceed.

For purposes of this preliminary injunction proceeding, the Court assumes that the interest reserve accounts and construction draw account were fully funded, and that the receiver has given appropriate accounting for the same.

### **Legal Issues**

Defendants argue that the Trustee's sale should be enjoined until trial on the merits of all claims can be completed. The Defendants make that argument based on the holding of the Arizona Supreme Court in *BT Capital, LLC v. TD Service Company of Arizona*, 229 Ariz. 299

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(May 4, 2012). Defendants argue that the holding in *BT Capital* means that there can be no trustee's sale while any claims are pending, whether those claims assert title to the property or not. This Court is not convinced of that logic. The Supreme Court held that BT Capital had lost its claim to title by virtue of the later trustee's sale. The Supreme Court denied BT Capital's claim for money damages against TD or PCF because BT did not appeal the trial court's dismissal of its tort claim. *BT Capital, LLC v. TD Serv. Co. of Arizona*, 229 Ariz. 299, 275 P.3d 598 (2012). Further, the Court held that BT Capital had no viable statutory or contract claim for damages because the statutes do not recognize a statutory right to recover damages because the statutes preclude a third party from asserting a claim for common law breach of contract against the trustee or beneficiary by virtue of irregularities in the trustee's sale. *BT Capital, LLC v. TD Serv. Co. of Arizona*, 229 Ariz. 299, 275 P.3d 598 (2012).

This Court does not read *BT Capital* as precluding independent tort claims or breach of contract claims against the lender independent of the trustee's sale, but only as precluding claims of title following a trustee's sale and precluding claims against a trustee or beneficiary based on improprieties in a trustee's sale, when those claims are not specifically authorized by the statutes. This Court does not read *BT Capital* as precluding all claims once a trustee's sale has been held.

Count Thirteen of the Third Amended Counterclaim seeks to declare the promissory notes and deeds of trust unenforceable. This is a claim that asserts a title interest in the property that would be lost if a non-judicial foreclosure were allowed to occur.

It does not appear that Defendants have tendered the balance due under the promissory notes and deeds of trust in order to retain title to the property. The issue was addressed in *Yank v. Juhrend* in the context of declaring the promissory note and deed of trust unenforceable in a residential land sale.

Yank fails to distinguish between void and voidable contracts in his insistence that he is entitled to have the contract declared unenforceable. According to the Restatement (Second) of Contracts § 7 (1979), "[a] voidable contract is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance." A party to a voidable contract must either seek avoidance of it through rescission or affirm the contract. Affirmance of the contract would require Yank to pay the balance due under it.

*Yank v. Juhrend*, 151 Ariz. 587, 589, 729 P.2d 941, 943 (Ct. App. 1986).

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On a rescission theory, in order for Defendants to proceed under Count Thirteen of the Counterclaim, Defendants must tender the principal amount owed in order to put the parties in the same position that they were in prior to the transactions. It does not appear that they have done so.

**Conclusions of Law**

The Court concludes that Count Thirteen of the Counterclaim does assert a claim affecting the title to the property that would be extinguished by foreclosure.

The Court further concludes that in order to proceed under Count Thirteen of the Counterclaim, Defendants must tender the principal amount of the loans.

The Court concludes that the other Counts of the Counterclaim will survive a trustee's sale, since they do not affect title to the property. Therefore,

**IT IS ORDERED** that the temporary restraining order will remain in effect through and including September 28, 2012.

**IT IS FURTHER ORDERED** that Defendants/Counterclaimants shall tender the principal amount of the Notes on or before September 28, 2012.

**IT IS FURTHER ORDERED** that if the Defendants/Counterclaims do not make the tender as ordered, the temporary restraining order shall expire on **September 28, 2012 at 5:00 p.m.**

**IT IS FURTHER ORDERED** that if tender is made, Plaintiffs shall be preliminarily enjoined from conducting a trustee's sale of the property.

**IT IS FURTHER ORDERED** that if tender is not made, Count Thirteen of the Third Amended Counterclaim shall be dismissed.

**IT IS FURTHER ORDERED** that all other claims of the Third Amended Counterclaim survive any trustee's sale involving these notes and deeds of trust to be determined on the merits.

The rulings made herein shall not be interpreted as rulings that any counterclaims state a claim, or otherwise will not be subject to dismissal or summary judgment, as the case proceeds.

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ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.